IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3646 OF 2004

Yashwant Yadav Mhase,
Age 37 years, occupation-
business & Agri, residing at
Ware, Taluka Karjat,
District-Raigad. .. Petitioner.
Vs
G.M.Shaha, since deceased,
through legal representatives
1a. Bharat G Shaha,

1b. Sunil G.Shah,
Both adults, residing at
Wada, District-Thane .. Respondents

Ms. Gauri Godse, for the petitioner.
Respondent, though served, remained absent.

CORAM : D.B.BHOSALE, J.

DATE : FEBRUARY 24, 2005.

ORAL JUDGMENT:

1. Heard Ms Godse, learned counsel for the petitioner. The respondents, though served, remained absent.

2. This petition under Article 227 of the Constitution of India impugns the order dated 29.1.2004 passed by the executing Court below applications-Exhibits 22 and 1 in Spl.Darkhast No.53 of 1996, by which the application filed by the heirs and legal representatives of the deceased-judgment debtor has been allowed and the judgment and decree

dated 24.7.1996 passed by the trial Court in Spl.Civil Suit No.158 of 1995 has been declared nullity on the ground that it was passed against a dead person. The respondents are the legal representatives of the deceased-judgment debtor. The suit was filed by the petitioner-plaintiff for recovery of an amount of Rs.48,474/- from the deceased-defendant.

3. The short question falls for my consideration is that after the judgment and decree is declared nullity on the ground that it was passed against a dead person whether or not it is open for the plaintiff to apply for setting aside the abatement, for condonation of delay and for bringing heirs and legal representatives of the deceased-defendant on record and seek hearing of the suit on merits afresh.

4. Briefly stated the facts, sans unnecessary details, are as follows. After institution of a suit, the first date of appearance of the defendant was fixed as 11.1.1996. Thereafter, the case was adjourned for written statement to 13.2.1996. Since, neither the defendant appeared nor did he file a written statement, the case was adjourned to 13.3.1996 for passing "No WS" order. The "No W.S."

order was passed on that date and then the case proceeded in the absence of the defendant and his W.S and it was ultimately decreed by the trial Court by its judgment and order dated 24.7.1996. The execution proceedings were, thereafter, initiated by the petitioner-decree holder in which Exhibit-22 application was filed by the respondents. Admittedly the respondents are the heirs and legal representatives of the deceased-defendant and they were not on record on the date of decree. The hearing of the case was concluded on 4.7.1996 and it was decreed on 24.7.1996. Whereas the deceased-defendant had expired on 11.2.1996. It appears that the death of the sole defendant was not known to the petitioner-plaintiff and as a result of which the suit was decreed against him. In the result, the decree was declared nullity as it was passed against a dead person.

5. Ms Godse, learned counsel for the petitioner, submitted that she has instructions not to press this writ petition and the petitioner would be satisfied if his applications, which are filed and pending before the trial Court, for setting aside abatement, for condonation of delay and for bringing legal representatives of the deceased-defendant on record,

are directed to be considered on merits in accordance with law. She fairly submitted that since the question raised in this writ petition is squarely covered by series of judgments of this Court and the Apex Court that need not be examined. According to Ms Godse, the impugned order declaring the decree nullity should not preclude the petitioner-plaintiff from making aforesaid applications and if such applications are filed the trial Court should pass appropriate orders on those applications and in the event they are allowed it should proceed to hear the suit on merits. Though, there is no such order, Ms Godse submitted that the trial Court is not passing any order on the aforementioned applications filed by the petitioner, since the judgment and decree has been declared nullity. In other words, the trial Court is treating itself a functus officio. Reliance was placed on the judgments of Apex Court in **Amba Bai and ors Vs. Gopal and ors, (2001) 5 Supreme Court Cases 570 and Mithailal Dalsangar Singh and ors Vs. Annabai Devram Kini and ors, (2003) 10 Supreme Court Cases 691**.

6. It is clear from the admitted facts that the suit, which had abated, proceeded without bringing the legal representatives of the deceased-defendant

on record by the plaintiff. It is against this backdrop the appeal Court rightly declared the judgment and decree nullity vide its order dated 29.1.2004. In my opinion, the net result of declaring a decree nullity, in such an eventuality, would be that the suit can proceed further from the stage at which it abates. The only remedy available to the plaintiff, in law, is to make an application for setting aside the abatement and for bringing the legal representatives of the deceased-defendant on record and if the right to sue survives, the Court, on such application, shall cause the legal representatives of the deceased-defendant to be made a party and shall proceed with the suit. In other words, if a decree is declared nullity on the ground that it was passed against a dead person, the only remedy available to the plaintiff is to invoke the provisions of Rule 4 Order 22 of CPC by filing applications for setting aside abatement as also for condonation of delay, if any, and for bringing legal representatives of the deceased-defendant on record. In any case, merely because the judgment and decree was declared nullity would not preclude the Court from passing appropriate orders on the application for setting aside the abatement and passing other consequential order/reliefs. In short, the remedy

available under Order 22 Rule 4 can be invoked by the plaintiff and in such case the Court is expected to pass appropriate orders in accordance with law. I do not wish to make any observations on merits in so far as the applications which have already been filed by the petitioner, and which are pending before the trial Court are concerned. In the circumstances, I am satisfied that the following order will meet the ends of justice.

(i) The trial Court shall decide the applications filed by the petitioner for setting aside abatement, for condonation of delay and for bringing legal representatives and heirs of the deceased-defendant on record in the suit, on merits in accordance with law as expeditiously as possible and preferably within a period of eight weeks from the date of receipt of this order. If those applications are allowed, the suit be decided on merits. With these observations, the writ petition stands disposed of.

(ii) The interim order that was passed on 18.10.2004, to remain operative for further period of 12 weeks from today with liberty to the petitioner to file appropriate application making similar prayer before the trial Court.

(iii) The writ petition, accordingly, stands disposed of.

(D.B.Bhosale, J.)